IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. W.A. DREW EDMONDSON, in his Capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT C MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA,	)	
Plaintiffs,	)	
v.	)	Case No. 4:05-CV-329-GKF-SAJ
TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC., CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC., WILLOW BROOK FOODS, INC.,	)	
Defendants.	)	

DEFENDANT SIMMONS FOODS, INC.'S RESPONSE TO PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF JOINT DEFENSE AGREEMENT

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Date: August 24, 2007

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DEFENDANT SIMMONS FOODS, INC.'S RESPONSE TO PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF JOINT DEFENSE AGREEMENT

Defendant Simmons Foods, Inc. ("Simmons") hereby responds to Plaintiff's motion to compel Simmons to produce the joint defense agreement between Simmons and the other Defendants. The details of the joint defense arrangements among the various Defendants in this case, including Simmons, are privileged and Plaintiff has no right to them. Simmons will confirm the existence of a joint defense agreement, which is probably no surprise to the Court where various companies have been sued under

basically identical allegations by the same plaintiff alleging they all caused the same harms.

Here is Plaintiff's complaint: "One of the privilege claims asserted was a so-called joint defense privilege . . . . Nowhere in the Simmons privilege log, however, is there any evidence provided which details or substantiates, *inter alia*, the existence of a joint defense agreement in this litigation, the parties to it, the date of its origin, or its scope of coverage. The State has therefore requested that Simmons disclose to the State copies of the applicable joint defense agreement so that it can, as is its right, assess the applicability of the privileges and protections being claimed." State's motion at pp. 1-2.

I. THE COMMON INTEREST PRIVILEGE SITUATION IS MAINSTREAM

Plaintiff's description of the "so-called joint defense privilege" implies that this is some newfangled concept, just cooked up by the Defendants and which Plaintiff has never heard of. The courts of this circuit, along with the courts of Oklahoma and everyone else, have long recognized the joint defense or common interest privilege situation. The applicable Restatement discusses it at some length. There is no "so-called" to the privilege.

The Tenth Circuit recognizes the joint defense privilege. To establish the privilege with respect to documents, a party must only demonstrate "(1) the documents were made in the course of a joint defense effort; and (2) the documents were designed to further that effort." *In re Grand Jury Proceedings*, 156 F.3 1038, 1042-43 (10th Cir. 1998) (citing *United States v. Bay State Ambulance & Hospital Rental Service, Inc.*, 874 F.2d 20, 28 (1st Cir. 1989); *United States v. Evans*, 113 F.3d 1457, 1467 (7th Cir. 1997); *United States v. Schwimmer*, 892 F.2d 237, 243-44 (2nd Cir. 1989)).

Moore's Federal Practice explains that what is referred to as the common interest privilege or joint defense privilege is really just a corollary to the rule that generally a privilege is waived if privileged information is disclosed to a third party. The rule really means that "parties with a shared interest in actual or potential litigation against a common adversary may share privileged information without waiving the privilege." Moore Federal Practice § 26.49[5](b). The rule generally covers both codefendants in actual litigation (and their lawyers, of course) and potential codefendants. *Id.*

The Restatement (Third) of the Law Governing Lawyers § 76, "The Privilege In Common-Interest Arrangements," summarizes the rule:

> (1) If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged under §§ 68-72 that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.
>
> (2) Comment c explains that:
>
> The common-interest privilege somewhat relaxes the requirement of confidentiality (see § 71) by defining a widened circle of persons to whom clients may disclose privileged communications. As a corollary, the rule also limits what would otherwise be instances of waiver by disclosing a communication (compare § 79). Communications of several commonly interested clients remain confidential against the rest of the world, no matter how many clients are involved. However, the known presence of a stranger negates the privilege for communications made in the stranger's presence.
>
> Exchanging communications may be predicated on an express agreement, but formality is not required. It may pertain to litigation or to other matters. Separately represented clients do not, by the mere fact of cooperation under this Section, impliedly undertake to exchange all information concerning the matter of common interest.

Comment d explains the scope of the persons covered: "Under the privilege, any member of a client set - a client, the client's agent for communication, the client's lawyer, and the lawyer's agent (*see* § 70) - can exchange communications with members of a similar client set . . . ."

Oklahoma has statutorily recognized that privilege applies in a joint defense or common interest situation:

> **A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:**
>
> 1. Between the client or a representative of the client and the client's attorney or a representative of the attorney;[1]
>
> 2. **Between the attorney and a representative of the attorney;**
>
> 3. **By the client or a representative of the client or the client's attorney or a representative of the attorney to an attorney or a representative of an attorney representing another party in a pending action and concerning a matter of common interest therein;**
>
> 4. Between representatives of the client or between the client and a representative of the client; or
>
> 5. Among attorneys and their representatives representing the same client.

12 O.S. § 2502(B) (emphasis added).

Magistrate Judge Joyner addressed joint defense privilege issues in *In re CFS-Related Securities Fraud Litigation*, 223 F.R.D. 631 (N.D. Okla. 2004). Judge Joyner

[1] A "representative of an attorney" "is one employed by the attorney to assist the attorney in the rendition of professional legal services," and a "representative of the client" "is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client." 12 O.S. §§ 2502(A)(2), (A)(3).

concluded the rule applied to parties on the plaintiff side with common interests. After discussing various cases, Judge Joyner concluded that one set of plaintiffs "may waive their attorney client privilege without repercussions to the attorney client privilege of other joint clients." Id. at 634. Further, "with respect to the joint client waiver issue, [ ] the waiver of the attorney client privilege by the [set of] Plaintiffs... does not operate as a blanket waiver with regard to the privileges of other joint clients." *Id.*

In reaching his conclusion, Judge Joyner noted several cases holding that "as between joint clients, one parties' waiver of the attorney client privilege does not effectuate the waiver of another parties' attorney client privilege." *Id.* "The joint defense doctrine provides only that the privilege is not automatically waived in the case of joint consultations or exchanges of information; each client still retains the right voluntarily to waive the privilege with regard to his confidential communications with his own attorney." *Id.* (quoting *Interfaith Housing Delaware, Inc. v. Town of Georgetown*, 841 F. Supp. 1393, 1402 (D. Del. 1994), which in turn quoted Stone & Liebman's *Testimonial Privileges* treatise). Further, "each client (and of course all together) may invoke the privilege as against third parties." *Id.* (quoting *Interfaith Housing*, 841 F. Supp. at 1402, which in turn quoted Louisell & Mueller's *Federal Evidence* treatise). Judge Joyner also invoked a District of Wyoming decision holding that the "waiver of privileges relating to information shared in joint defense communications by one party to such communications will not constitute a waiver by any other party to such communications." *Id.* (quoting *Western Fuels Association v. Burlington N. R.R. Co.*, 102 FRD 201, 203 (D. Wyo. 1984).

There may be some procedural questions about which version of the privilege should be applied to various aspects of the case, but it is clear under either general federal evidence law or Oklahoma evidence law, the Defendants in this case share common legal interests and as a matter of fact have confidentially communicated with one another in furtherance of those common interests.[2]

II. COMMON INTEREST ARISES FROM THE SITUATION OF SHARED LEGAL INTERESTS - NO WRITING IS NECESSARY

The common interest privilege applies whenever parties share common interests. No formal joint defense agreement is necessary to have the protection. Most of the cases involve the court looking at the situation and recognizing the common interest applies. But some parties, in the interest of clarity, memorialize the agreements among themselves. Those agreements are none of their opponents' business.

A. Joint Defense Agreements Are Not Discoverable

Other plaintiffs have tried to get access to joint defense agreements, on various theories they were entitled to review the terms. Like Plaintiff, they wanted to "assess the applicability of the privileges and protections being claimed," or invented other concerns. The courts have generally denied those requests and explained why.

United States v. Bicoastal Corp., 1992 WL 693384 at *6 (N.D. N.Y. September 28, 1992) is a good example. This was a multi-defendant criminal prosecution for conspiracy and fraud, for overcharging the federal government under military contracts. The prosecution wanted to see any joint defense agreements, under the guise of inquiring into defense counsel's potential conflicts of interest. The

[2] *In Sprague v. Thorn Ams., Inc.*, 129 F.3d 1355, 1368-69 (10th Cir. 1997), found that as to "state causes of action, a federal court should look to state law in deciding privilege questions . . . . [W]ith both federal claims and pendent state law claims implicated, we should consider both bodies of law under *Motley* and Fed. R. Evid. 501." In this case, both federal law and Oklahoma law agree as to the privilege.

government argued that the existence of a joint defense agreement could taint other lawyers with conflicts problems. The court at *5 concluded that notwithstanding the possible existence of a written agreement, defendants with common interests in multi-defendant actions are entitled to share information protected by the attorney-client privilege without danger that the privilege will be waived by disclosure to a third person. So the court said the existence of an agreement does not change the character of the privilege and raises no conflict that would not otherwise exist. At *6:

> Finally, the Government argues that if such an agreement exists, the Government must receive a copy of the agreement. Defendants strenuously object. The defendants argue that if an agreement exists, the Government has no right to see any part of it. Additionally, defendants claim that the handing over of such an agreement to the Government would be tantamount to disclosing the type of defense that the defendants were considering, as well as whether defendants felt that they had common interests.
>
> This court does find that the disclosure of the existence of such an agreement would be an improper intrusion into the preparation of the defendants' case. Thus, this court will deny any motion by the Government to be provided with any joint defense agreement should one exist.

A few years later the Southern District of New York came to the same conclusion. In *A.I. Credit Corp. v. Providence Washington Insurance Co., Inc.*, 1997 WL 231127, at *4 (S.D.N.Y. May 7, 1997), a defendant company and a defendant agent of the company entered into a joint defense agreement and asked to use one counsel for both. After the district court approved the arrangement, the plaintiff asked the court to reconsider letting defendants use their counsel of choice and tried to inquire into the joint defense arrangements. At *4:

> Finally, AICCO [plaintiff] contends that the Court should defer decision until AICCO receives and 'explores' the joint defense agreement. Waiting would only leave defendants in representation limbo. Moreover, it is unlikely that AICCO will be provided any discovery of or about the joint defense agreement, since joint defense agreements are generally considered

> privileged. *See, e.g.*, United States v. Bicoastal Corp., 92-CR-261, 1992 WL 693384 at *6 (N.D.N.Y. Sept. 28, 1992) ('This court does find that the disclosure of the existence of such an [joint defense] agreement would be an improper intrusion into the preparation of the defendants' case. Thus, this court will deny any motion by the Government to be provided with any joint defense agreement should one exist.').

Fort v. Leonard, 2006 WL 2708321 (D. S.C. 2006), involved a lawsuit by a bankruptcy trustee against former officers of a bankrupt company and their lawyers for negligence and breach of fiduciary duty. This opinion was on the trustee's motion to compel production of joint defense agreement and communications among defendants and their counsel. At *2:

> The plaintiff contends that the defendants must 'either produce a copy of the written agreement for review or submit affidavits of the signatory parties concerning the material provisions of the oral joint defense agreement' (pl. m. to compel 4). The plaintiff states that without reviewing such an agreement the scope of any protection it might provide cannot be ascertained. The plaintiff further claims that the agreement itself, if one does exist, does not fall under privileged communications because no legal advice is sought or given in the document itself.

The court went on to discuss how there is no requirement for a written joint defense agreement or written affidavits to have the joint defense privilege - all that is required is a showing of common interest:

> This court has reviewed the parties' arguments and finds that the defendants hold a common legal interest and, therefore, they have not waived the attorney-client privilege by sharing privileged information with each other. The existence of any joint defense agreement would not change the application of the common interest rule in this case and any such written or oral agreement would be irrelevant. [Citations omitted.] Based upon the foregoing, the motion to compel is denied.

At *3.

Heartland Surgical Specialty Hospital v. Midwest Div., Inc., 2007 WL 950282 (D. Kan. 2007), resolved a motion to compel against each defendant by the plaintiff in an antitrust lawsuit against hospitals and insurers. At *9:

> Heartland seeks production of the joint-defense agreement entered into by all Defendants to this litigation. Alternatively, Heartland requests the Court to compel Defendants to produce the joint-defense agreement to the Court for in camera inspection. Heartland believes the joint-defense agreement furthers the alleged conspiracy by Defendants to restrain competition and prohibits individual Defendants from settling without other Defendants' permission. Heartland does not state the evidentiary basis for these beliefs. . . . Defendants respond that the joint-defense agreement is protected from disclosure by the joint-defense privilege.

The court explained that to establish the joint-defense privilege, the proponent of the privilege must first establish either the attorney-client or work-product privileges, and then must also demonstrate: (1) the documents were made in the course of a joint-defense effort; and (2) the documents were designed to further the effort, citing *In re Grand Jury Proceedings*, 156 F.3d 1038, 1043 (10th Cir. 1998):

> Heartland offers no basis for why or how the joint-defense privilege has been waived. Absent waiver of the privilege, a properly asserted privilege protects the document from being disclosed . . . . [Citation omitted.]
>
> Further, Heartland has cited no evidentiary authority for requiring in camera inspection of the joint-defense agreement . . . . The Court will not undertake an in camera review of the joint-defense agreement when the applicability of the privilege is clear to the Court and Heartland has stated no basis for review.

Id.

Boyd v. Comdata Network, Inc., 88 S.W.3d 203 (Tenn. App. 2002), was an interlocutory appeal from a discovery order. The trial court had ordered production of materials about the negotiation and drafting of a joint defense agreement. The Tennessee Court of Appeals reversed that order as a clear abuse of discretion. The court found that an attorney affidavit was an appropriate way to establish the existence of a common

interest privilege.[3] At p. 217, the court disapproved of the plaintiff's desire to sniff around the joint defense arrangements:

> The trial court also overlooked that the compelled disclosure of the existence of a joint defense agreement is an improper intrusion into the preparation of a litigant's case. *United States v. Bicoastal Corp.*, No. 92-CR-261, 1992 WL 693384, at *6, 1992 U.S. Dist. LEXIS 21445, at *8 (N.D.N.Y. Sept. 28, 1992), and the joint defense agreements are themselves privileged. *Waller v. Financial Corp. of Am.*, 828 F.2d 579, 584 (9th Cir. 1987) (warning against the disclosure of a joint defense agreement); *A.I. Credit Corp. v. Providence Washington Ins. Co.*, No. 96 Civ. 7955 (AGS) (AJP), 1997 WL 231127, at *4, 1997 U.S. Dist. LEXIS 6223, at *12 (S.D.N.Y. May 7, 1997). Thus, while the courts may review joint defense agreements in chambers, the agreements are not discoverable by other parties.

LaSalle National Bank Association v. Lehman Brothers Holdings, Inc., 209 FRD 112 (D. Md. 2002), involved a defendant moving to compel documents from the plaintiff and from a nonparty with whom the plaintiff had common interests. The plaintiff and non-party claimed privilege. The court explained at p. 116 that persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other in order to more effectively prosecute or defend their claims without waiving privileged attorney-client communications. The plaintiff and the nonparty had common interests in the outcome of the lawsuit. They had gone so far as to ink a written common interest agreement. The court recognized that the written agreement did "no more than confirm the existence of the common legal interest" between the plaintiff and the nonparty. Because the Court could see from the parties' positions that the plaintiff and the nonparty had common interests, it denied the motion to compel.

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[3] *Id.* at 215, n.18.

Static Control Components, Inc. v. Lexmark International, Inc., 2007 WL 219955 (D. Colo. 2007), involved a subpoena requesting communications exchanged pursuant to a common interest agreement. The court briefly reviewed the common interest or joint defense privilege, noting that "[t]he joint defense privilege preserves the confidentiality of communications and information exchanged between two or more parties and their counsel who are engaged in a joint defense effort." At *3. The parties resisting the discovery submitted an affidavit asserting that the parties who were aligned in the lawsuit had participated in privileged communications concerning matters of joint interest pursuant to a common interest agreement. *Id.* at *4. The court concluded the information being sought was privileged, and quashed the subpoena.

Eisenberg v. Gagnon, 766 F.2d 770 (3rd Cir. 1985), was a securities fraud case. The unsuccessful plaintiff argued on appeal that the trial court should have compelled production of correspondence between a defendant and a lawyer representing their insurer. The court said at pp.787-88:

> We agree with the district court's ruling that the correspondence was privileged, since it is best viewed as part of an ongoing and joint effort to set up a common defense strategy between a defendant and an attorney who was responsible for coordinating a common defense position. Communications to an attorney to establish a common defense strategy are privileged even though the attorney represents another client with some adverse interests. *See United States v. McPartlin*, 595 F.2d 1321, 1336-37 (7th Cir.), *cert. denied*, 444 U.S. 833, 100 S. Ct. 65, 62 L.Ed.2d 43 (1979); *Hunydee v. United States*, 355 F.2d 183, 184-85 (9th Cir. 1965); *Continental Oil Co. v. United States*, 330 F.2d 347, 349-50 (9th Cir. 1964); 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 503 (b) [06] (1982). *See also Id.* ¶ 503 (b) [07] at 503-65.

B. The Joint Defense Agreement Is Not Necessary to Establish The Privilege

Plaintiff argues that the terms of the joint defense agreement among Defendants are relevant "to the issue of the propriety of Simmons' joint defense privilege claims." Plaintiff's motion at p. 2. This is nonsense. The joint defense privilege would attach whether or not the Defendants ever entered into any written joint defense agreement; the privilege attaches when the defendants share common interests and share information among themselves which is privileged as to third parties. The cases already discussed are clear on this. The **situation** is what creates the common interest privilege, not the written agreement. So what is the situation? Plaintiffs' various iterations of Complaints allege that all the Defendants have acted in violation of state and federal law to create indivisible harms. *See, e.g.*, Second Amended Complaint at ¶¶ 29, 73, 88, 99, 128, 140.

Plaintiff has steadfastly refused in discovery to tell any particular Defendant what it is supposed to have done or what areas it is supposed to have impacted. Plaintiff alleges industry-wide practices in which it says all Defendants have participated. So whether Defendants ever bothered to sit down and write out a joint defense agreement or not, they had and have common interests.

Plaintiff argues that a party resisting discovery based on a claim of privilege has the burden of establishing that the privilege applies. Letting Plaintiff look through Defendants' private agreement among themselves will not do anything to establish or extinguish a joint defense privilege. The privilege is straightforward to establish. The cases above recognize that. As set forth in the accompanying Affidavit of John Elrod, attached hereto as Exhibit "1," Simmons has communicated with the other Defendants in connection with their jointly coordinated defense of this case.

C. Plaintiff's Cases Don't Change The Result

Plaintiff relies on *Carbajal v. Lincoln Benefit Life Company*, 2007 WL 1964073 (D. Colo. 2007), for the idea that a party claiming a privilege has to show the privilege applies. *Carbajal* appears to say that parties must continue to log all privileged communications between lawyer and client occurring after the lawsuit commences and continues. But the relevant part of *Carbajal* briefly discusses the common interest privilege situation. The *Carbajal* court recognized the concept of the common interest or joint defense privilege: "The joint defense privilege preserves the confidentiality of communications and information exchanged between two or more parties and their counsel who are engaged in a joint defense effort. Waiver of the joint defense privilege requires the consent of all parties participating in the joint defense. At *4.

The defendants in *Carbajal* did not provide any support for the existence of a joint defense situation after the plaintiff raised the issue, or even after the plaintiff moved to compel. The district court faulted the defendants for failing to provide "evidence of the existence of a joint defense agreement; the parties to it; its date of origin or its scope." *Id.*

While Simmons considers the Defendants' joint defense arrangements *inter se* to be off-limits to Plaintiff, Simmons recognizes that several of the cases consider an attorney affidavit an appropriate way to establish to the Court the existence of a joint defense or common interest arrangement, whether that agreement is written or unwritten. Accordingly, Simmons submits an affidavit from Simmons counsel, John Elrod, about the existence and general nature of the joint defense arrangements in this case. If Plaintiff's real interest is having some basis upon which to evaluate the concept of the

privilege claims made by Defendants, rather than gratuitously snooping, that should suffice.

Plaintiff argues, contrary to the great weight of authority, that joint defense agreements are not privileged. Plaintiff relies on *United States v. Hsia*, a 2000 District of Columbia District Court case and *Trading Technologies International, Inc. v. eSpeed, Inc.*, a 2007 Northern District of Illinois District Court case.

Trading Technologies International, Inc., v. eSpeed, Inc., 2007 WL 1302765 (N.D. Ill. 2007), involved a request by a plaintiff that all the many defendants produce (i) information about who was involved in the joint defense group and when they joined, plus (ii) all communications between the defendants before they became members of the joint defense group. The court recognized that no written agreement was necessary to create a joint defense privilege, as it was clear to the court the various defendants had been participating in joint defense strategies. The court found the defendants had clearly expressed an intent to cooperate in the litigation and invoke the joint defense privilege. At *1.

Because the privilege protects both parties and potential parties to lawsuits, the Court refused to order the defendants to submit communications among themselves prior to or during the lawsuits. At *2. The case does actually support Plaintiff in one way. The district court did ask that if the joint defense agreement was memorialized in writing, the defendants should give plaintiff a copy. This aspect of the case goes against the grain of the modern approach to these matters, and Simmons suggests that the Illinois district court made the wrong call.

In *United States v. Hsia*, 81 F. Supp. 2d 7 (D. D.C. 2000), a criminal defendant (Hsia) moved to dismiss her indictment because, she theorized, the government had improperly obtained and used information disclosed at joint defense meetings. The district court held an evidentiary hearing at which all parties apparently acknowledged the existence of an unwritten joint defense agreement, and the government and lawyers for the other defendants denied trading Hsia's confidential information. The court briefly outlined the joint defense or common interest privilege, explaining that it "permits a client to disclose information to her attorney in the presence of joint parties and their counsel without waiving the attorney-client privilege and is intended to preclude joint parties and their attorneys from disclosing confidential information learned as a consequence of the joint defense without permission." 81 F. Supp. 2d at 16.

The *Hsia* court also observed in a footnote at p. 11 that it did not think the existence or terms of the unwritten joint defense agreement were privileged, and that in any event several witnesses had discussed the existence of the agreement in open court. Testimony about the terms of the agreement was taken in a closed hearing outside the presence of the government's lawyers. So whatever the *Hsia* court's thoughts on the matter generally, it protected the details of the defendants' arrangements from the government.

Whatever the law of other circuits, here the standard is easy to discern; a party must only demonstrate "(1) the documents were made in the course of a joint defense effort; and (2) the documents were designed to further that effort." *In re Grand Jury Proceedings*, 156 F.3 1038, 1042-43 (10th Cir. 1998). This circuit does not require the production of a written agreement to prove the existence and force of the privilege (if

there is such an agreement in a particular case) and no written agreement is necessary for the privilege to apply.

III. CONCLUSION

Plaintiff complains that Simmons did not support its privilege logs with anything indicating the existence of the privilege. Ordinarily, one does not accompany privilege logs with affidavits or other materials (certainly Plaintiff did not). The lawyers involved are supposed to make only good faith claims as officers of the Court. In correspondence with Plaintiff, Ms. Bronson for Simmons made clear the basis of the privilege claims. But since Plaintiff insists of pressing the issue, Simmons has come forward with the attached Affidavit of John Elrod.

The pleadings in this case, absent any affidavits or other materials, make it obvious the Defendants have common interests in their defense against Plaintiff's claims and have been pursuing to some degree a coordinated defense. To the extent there was any doubt, Simmons has now established the existence of a joint defense agreement. Plaintiff's motion to compel should be denied.

Respectfully submitted

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I hereby certify that on August 24, 2007, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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